

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2010

Cir. Ct. No. 2011GN62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE PROTECTIVE PLACEMENT OF TERRY L. M.:

SHEBOYGAN COUNTY,

PETITIONER-RESPONDENT,

V.

TERRY L. M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
TERENCE T. BOURKE, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Terry L. M. appeals from an order for continued protective placement. *See* WIS. STAT. § 55.18. Terry maintains that the real controversy was not fully tried because the jury was not asked to find in a single, separate question that Terry is incompetent and because asking the protective placement questions interspersed with guardianship questions was too confusing. We conclude that Terry waived any objection to the jury instructions and special verdict, that the jury instructions and special verdict addressed all the necessary prerequisites to the circuit court's order for continuation of protective placement, and that the jury instructions and special verdict were not confusing so as to call the outcome into question. We affirm.

BACKGROUND

¶2 WISCONSIN STAT. ch. 55 governs protective placement. The Wisconsin legislature has declared the following purpose and policy considerations underlying ch. 55:

55.001 Declaration of policy. The legislature recognizes that many citizens of the state, because of serious and persistent mental illness ... are in need of ... protective placement.... [T]he ... protective placement should, to the maximum degree of feasibility ... allow the individual the same rights as other citizens, and at the same time protect the individual from financial exploitation, abuse, neglect, and self-neglect. This chapter is designed to establish those ... protective placements, to assure their availability to all individuals when in need of them, and to place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, financial exploitation, neglect, and self-neglect.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version.

WIS. STAT. § 55.001. The “protective placement system shall be designed to encourage independent living and to avoid protective placement whenever possible.” WIS. STAT. § 55.02(1)(a)1.

¶3 Protective placements may be ordered under WIS. STAT. ch. 55 “only for an individual who is adjudicated incompetent ... and only if there is a finding of a need for protective placement under [WIS. STAT. §] 55.08(1).” WIS. STAT. § 55.06. Under § 55.08(1), a court may order protective placement if an individual meets all of the following standards:

(a) The individual has a primary need for residential care and custody.

(b) The individual ... is an adult who has been determined to be incompetent by a circuit court.

(c) As a result of ... serious and persistent mental illness ... the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others. Serious harm may be evidenced by overt acts or acts of omission.

(d) The individual has a disability that is permanent or likely to be permanent.

Sec. 55.08(1). Once placed under a protective placement order, individuals are entitled to annual status reviews to determine whether they remain in need of protective placement. WIS. STAT. § 55.18. To order continuation of a protective placement under § 55.18(3) after a hearing, the court must find that “the individual continues to meet the standards under [§] 55.08(1).”² Sec. 55.18(3)(e)1.

² To order continued protective placement in the same environment, the court must also find that “the protective placement of the individual is in the least restrictive environment.” WIS. STAT. § 55.18(3)(e)1. This prong of the court’s determination is not at issue on this appeal.

¶4 On December 2, 2013, Sheboygan County petitioned for an annual review of Terry’s protective placement. The annual protective placement review filed in conjunction with the petition alleged, among other things, that Terry is a sixty-four-year-old male diagnosed with numerous mental and physical conditions, including Wernicke-Korsakoff Syndrome, paranoid schizophrenia, bipolar disorder, anxiety, insomnia, diabetes, stage III chronic kidney disease, and osteoporosis. The review further indicated that Terry exhibits poor insight and judgment, compulsive behavior, mood swings, and obsessive thought and that he has ongoing paranoid ideation, grandiose delusions, and increasingly poor memory. His current physical and mental health conditions necessitate twenty-four hour supervision with ongoing medication management.

¶5 Terry requested a jury trial on the petition, and the jury heard the case on March 4, 2014. The court appointed Dr. Steven Staehling (Terry’s primary care physician) and Dr. Peter Kores (a psychologist) to examine Terry and file a written report containing a summary of the examination. Both doctors testified at the hearing. The jury also heard testimony from a nurse who works at Terry’s residential facility, an adult protective services specialist, and the guardian of Terry’s person and estate. The jury found that Terry was in continued need of protective placement.

DISCUSSION

Standard of Review

¶6 Circuit courts have broad discretion in instructing the jury. **Weborg v. Jenny**, 2012 WI 67, ¶42, 341 Wis. 2d 668, 816 N.W.2d 191. “A circuit court appropriately exercises its discretion in administering a jury instruction so long as

the instruction as a whole correctly states the law and comports with the facts of the case.” *Id.*

¶7 It is undisputed that all of the standards for the court to order protective placement under WIS. STAT. § 55.08(1)(a), (c), and (d) were included in the jury instructions and special verdict. The jury determined that Terry’s condition was likely to be permanent, that he had a serious and persistent mental illness, and that he was in need of protective placement, which meant that he was so totally incapable of providing for his own care that he was a substantial risk of harm to himself or others and had a need for residential care and custody. Terry argues only that the lack of a single, separate question asking whether he was incompetent under § 55.08(1)(b), combined with the fact that the incompetency elements were interspersed with references to guardianship, means that the real controversy was not fully tried and that he is therefore entitled to a new trial. In response, the County argues that it did not need to prove Terry was incompetent because the statute only requires that a finding of incompetency had previously been made by the circuit court.

The Statute

¶8 We squarely reject the County’s argument that it does not need to prove incompetency at a continuation review hearing. By requiring the court to find that the individual “continues to meet the standards under [WIS. STAT.] § 55.08(1),” the statute governing continuations clearly requires the County to prove incompetency when a review hearing is held under WIS. STAT. § 55.18 (3)(d), (e). “Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must

cease when those reasons no longer exist.” *State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cnty.*, 122 Wis. 2d 65, 80, 362 N.W.2d 104 (1985) (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring)).

¶9 In *Watts*, the Wisconsin Supreme Court declared the statute governing protective placement of individuals unconstitutional because it deprived “individuals of an automatic periodic reexamination of the need for continued protective placement.” *Id.* at 72. By allowing for indefinite periods of confinement, protective placement orders were “tantamount to a life sentence to a nursing home or other custodial setting.” *Id.* at 77. One of the requirements to initiate and to continue protective placements is that “[t]he individual has a disability that is permanent or likely to be permanent.” WIS. STAT. § 55.08(1)(d). *Watts* addressed this provision specifically: “The acceptance of a condition only ‘likely to be permanent’ allows the possibility of protective placement for impermanent disability. Thus, the individual’s incompetence ... may change with time. It is because this possibility exists that we hold protectively placed individuals are entitled to the right of periodic, automatic judicial review....” *Watts*, 122 Wis. 2d at 83. It makes no sense to require annual reviews of protective placements that do not require that the individual be found incompetent. The “has been determined” wording of § 55.08(1)(b) makes clear that a finding of incompetency, along with the other standards of § 55.08(1), is a prerequisite to a court’s initial and continuing orders for protective placement.

Waiver

¶10 While not contested, we note that any error in the jury instructions or special verdict was waived because Terry did not object during the jury instruction conference.

¶11 When a party fails to object to a jury instruction or special verdict form, any error is waived. WIS. STAT. § 805.13(3).

At the close of the evidence ... [t]he court shall inform counsel on the record ... of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

Id.

¶12 Terry did not object to the jury instructions or special verdict. Notably, Terry's proposed jury instructions and special verdict did not seek a separate finding of incompetence. Instead, they asked:

[I]s Terry [L. M.] in need of protective placement[?] A person is considered to be in need of protective placement if that person:

- a. Has a primary need for residential care and custody;
and
- b. As a result of serious and persistent mental illness [is] so totally incapable of providing for his own care or custody as to create a substantial risk of harm to himself or others; and
- c. The individual has a disability that is permanent or likely to be permanent.

Each of these questions was addressed in the jury instructions and special verdict. Terry waived any error in the jury instructions or special verdict.

WISCONSIN STAT. § 752.35: Discretionary Power to Reverse

¶13 Having waived any objection to the jury instructions and special verdict, Terry asks this court to exercise its power of discretionary reversal under WIS. STAT. § 752.35. The court of appeals has “the discretionary power to reverse judgments where unobjected-to error results in either the real controversy not having been fully tried or for any reason justice is miscarried under ... [§] 752.35.” *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). This court, however, will exercise its power of discretionary reversal only in exceptional cases. *Id.* at 11. We will not grant a new trial unless there is a reasonable possibility that the circuit court’s error affected the outcome of the case. WIS. STAT. § 805.18(2). A party’s substantial rights are unaffected by an error if it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict without the error. *See State v. Head*, 2002 WI 99, ¶44, 255 Wis. 2d 194, 648 N.W.2d 413. Here, we conclude that the jury instructions and special verdict, as a whole, correctly stated the law, *see Weborg*, 341 Wis. 2d 668, ¶42, and that Terry’s rights were unaffected by the order of the questions and the fact that there was not a single, separate question regarding incompetency.

¶14 WISCONSIN JI—CIVIL 7060, which applies to initial protective placement and continuance of a protective placement, sets forth the following elements for a finding of incompetency:

Question 1 in the verdict reads: Is (individual) incompetent at the time of this hearing?

To answer question 1 “yes,” you must find the following:

- a. That (individual) is aged at least 17 years and 9 months; and
- b. That (individual) suffers from ... (“serious and persistent mental illness”) ...; and
- c. That because of (impairment), (individual) is unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that (he) (she) cannot (meet the essential requirements for (his) (her) physical health and safety)...; and
- d. That (individual)’s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

WIS II—CIVIL 7060.

¶15 Regarding the first element, Terry was sixty-four years old at the time of the hearing. Regarding the second element, the jury answered yes to special verdict question No. 1, which asked if Terry suffered from serious and persistent mental illness. The jury instruction defined serious and persistent mental illness:

Serious and persistent mental illness means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration.

The third and fourth elements of a finding of incompetency were presented to the jury as conditions precedent to the jury’s finding that Terry needs a guardian of his person:

- a. That Terry [L. M.] is unable to effectively receive and evaluate information or to make or communicate

decisions to such an extent that he cannot meet the essential requirements for his physical safety. Essential requirements for physical safety includes performing actions necessary to provide the healthcare, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur.

b. That Terry [L. M.]’s need for assistance in decision-making or communication cannot be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.

Furthermore, the jury instruction for special verdict question No. 4, asking if Terry needed protective placement, said, “You should answer ‘yes’ if Terry [L. M.]’s *incompetence* is likely to continue for the balance of his life.” (Emphasis added.) For special verdict question No. 5, asking if Terry [L. M.] is in need of protective placement, the jury was instructed, “A person is considered to be in need of protective placement if that person ... [i]s so totally incapable of providing for his own care or custody that he is a substantial risk of harm to himself or others.” All of the elements of incompetency were found by the jury. In addition, the court instructed the jury that the burden of proving incompetency and the need for protective placement was on the County and that the evidence must show that incompetence existed at the time of the hearing. The jury did find Terry incompetent and in need of protective placement, so the real controversy was fully tried.

¶16 Terry also argues that the real controversy was not fully tried because the manner in which the jury instructions and special verdict were presented—with some questions regarding guardianship mixed in with questions regarding protective placement—was confusing to the jury. Terry maintains that the “instructions given here conflated the protective placement issue with the need for a guardian.” The jury instructions and special verdict did contain references to

guardianship of Terry's person and estate. However, Terry fails to explain how this would confuse the jury. Furthermore, Terry makes no argument that separating protective placement instructions and questions from guardianship instructions and questions would have resulted in a different verdict. Similarly, with regard to Terry's argument that there had to be a single, separate question on incompetency, Terry never argues that if there had been such a question the jury would have answered it "no." References to guardianship in the jury instructions and special verdict were not so confusing as to create a reasonable possibility that the outcome of the case was affected. *See* WIS. STAT. § 805.18(2).

CONCLUSION

¶17 Terry waived his objection to the jury instructions and special verdict, the jury instructions and special verdict addressed all the necessary findings for the circuit court's order for continuation of protective placement, and the order of the jury instructions and special verdict was not confusing so as to call the outcome into question. We decline to exercise our discretionary power to reverse, as this controversy was fully tried. We affirm the circuit court's order extending Terry's protective placement.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

